

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEALS UNDER SECTION 109 Nos.13, 14 & 15 of 1995

with

CIVIL APPLICATIONS Nos.32, 33 & 34 of 1995

**

For Approval and Signature:

Hon'ble MR.JUSTICE H.L.GOKHALE

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
NOT NECESSARY
 2. To be referred to the Reporter or not?

YES
 3. Whether Their Lordships wish to see the fair copy of the judgement?
NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
NO
 5. Whether it is to be circulated to the Civil Judge?
NO

GOKUL SPICES PRIVATE LTD.

Versus

RAMDEV FOOD PRODUCTS PVT.LTD.

Appearance:

1. APPEAL UNDER SECTION 109 No. 13 of 1995
MR RR SHAH for Petitioner
MR YJ TRIVEDI for Respondent No. 1
MR RC JANI for Respondent No. 2
 2. CIVIL APPLICATION No.32 of 1995
MR RR SHAH for Petitioner
NOTICE SERVED for Respondent No. 1, 2
-

CORAM : MR.JUSTICE H.L.GOKHALE

Date of decision: 19/02/98

ORAL JUDGEMENT :

Shri R.R. Shah, learned counsel appears for the appellants. Shri Y.J. Trivedi, learned counsel appears

for respondent no.1. Both the learned counsel have made their submissions at length.

2. In all these appeals respondent no.1, Ramdev Food Products Pvt. Ltd, applied for registration of trade mark in the form of label consisting of word 'Ramdev' along with a device of a man riding horse. The appellant herein filed their opposition and notices thereof were served on respondent no.1 on 18.1.1995.

3. Section 21(2) of the Trade and Merchandise Marks Act, 1958 (hereinafter referred to as "the Act") requires the applicant to send a counter claim statement to the Registrar, if he wants to send one, within two months from the date of receipt of a copy of the notice of opposition. In the instant case the notice was received on 18.1.1995. The applicant (respondent no.1 herein) was required to send his counter by 17.3.1995. 17.3.1995 was a public holiday on account of Holi. 18.3.1995 and 19.3.1995 were closed holidays, being Saturday and Sunday, for the office of the Registrar of Trade Marks. The applicant (respondent no.1 herein) sent counter statement by Postal Certificate on 20.3.1995, which was received in the office of the Registrar of Trade Marks on 21.3.1995.

4. On receiving said counter statement, the Assistant Registrar, respondent no.2 herein, caused a notice to be issued to the parties and on hearing them passed orders on 22.3.1995, holding that the counter statement was in time. Being aggrieved by these three orders, these three appeals are preferred.

5. Earlier in these three matters Civil Applications were filed by the appellant herein seeking record of these matters from the office of respondent no.2 (Assistant Registrar of Trade Marks) and also seeking affidavit of respondent no.2. This Court (Coram : S.D. Dave, J.) having heard the matters on 30.1.1996 directed some responsible officer from the office of respondent no.2 to remain present with the records and documents enlisted in those Civil Applications on the returnable date. As far as the affidavit of respondent no.2 is concerned, learned Judge deferred its consideration to a later stage and by that order the learned Judge disposed of those Civil Applications.

6. Today, the matter reached for admission. Nobody is present from the office of respondent no.2 with the record as was directed. Hence I asked Shri Shah, learned counsel appearing for the appellant as to what was the justification for those documents. I perused the Civil

Applications, which had been filed earlier leading to the above referred order. There is no justification whatsoever recorded in the Civil Applications. I perused the appeal memo filed in the present appeals too and found no justification therein as to why all those documents were required.

7. In any event to complete the record, I will set out the order passed by the learned Judge, which reads as follows :

"The present orders shall govern the disposal of these three Civil Applications.

Upon hearing learned counsels for the parties the present three Civil Applications are disposed of by saying that some responsible ministerial officer of the respondent no.2 shall remain present before me with the records and the documents enlisted at para 2(a) to (e) in each of the applications on the next date of hearing of the Appeals, that is, 22nd February 1996. The question regarding affidavit of respondent no.2 can be considered at a later juncture. Nonetheless the present three Civil Applications stand disposed of with the above said orders. No costs."

8. The documents which were required are mentioned in para 2 at entries nos.(a) to (e) which are as following :

"(a) Office records and procedures of the Opposition No.AMD - 785.

(b) Postal Registration white slip
dt.17.1.1995.

(c) Postal Regd. A.D. receipt duly signed
and received back by the Resp. No.2.

(d) Register of valuables recording entry of
receipt of alleged cheque of Rs.300/- of Resp.
No.1.

(e) Despatch/ outward register showing
particulars of documents sent to the Resp. No.1
on or about 17.1.1995."

9. It is well settled that if anybody wants any documents to be called for, then there ought to be

justification as to why the same are required. As stated above in the entire Civil Application or appeal memo not a word is there as to why any of these documents are required for fully and properly deciding these three applications or appeals.

The first entry required is :

- (a) Office records and procedures of the Opposition -

Now, the opposition is filed by the appellant herein. He can point out from his papers if there is anything relevant.

- (b) Postal Registration white slip dt.17.1.1995 -

There is no dispute that the notice from the Registrar to the applicant was received on 18.1.1995. There is no need to call for this slip too.

- (c) Postal Regd. AD receipt duly signed and received back by the Resp. No.2.

No date or particulars are given with respect to this entry.

- (d) Register of valuables recording entry of receipt of alleged cheque of Rs.300/- of Resp. No.1.

Again there is no whisper anywhere that the counter statement along with money was not received on 21.3.1995, and hence the register is not necessary.

- (e) Despatch/ outward register showing particulars of documents sent to the Resp. No.1 on or about 17.1.1995.

For the reasons stated earlier this is also not at all relevant inasmuch as the receipt of the notice from the Registrar by the applicant on 18.1.1995 is not disputed.

10. Shri Shah, learned counsel stated across the Bar that he is disputing that any such counter statement with payment was received by the office of the Registrar on 21.3.1995. On these factual aspects the statements made across the Bar are of no value. This is a matter of fact. Somebody has to allege it. One appeal memo and one Civil Application were sufficient for anybody to state it on oath, if wanted to do so. As far as the record of the

proceedings are concerned, the learned Assistant Registrar has, in terms, stated at number of places in the order that certificate of posting dated 20.3.1995 was filed before the officer. At page 4 of the order it is stated as follows :

"Shri Y.J. Trivedi, advocate has filed the 'certificate of posting' indicating that a packet was sent to the office of Trade Marks Registry on 20.3.1995 from the Navrangpura Post Office. Certificate of Posting bears the clear stamp of the Post Office with the date of 20.3.1995, and the address to the Assistant Registrar of Trade Marks, National Chambers, Navrangpura, Ahmedabad. There is nothing suspicious in the form of the certificate which may create a doubt on its genuinity nor anything has been pointed out to this Tribunal by the opponents leading to any doubt on its genuinity."

11. If any authority is required on this position, in State of Maharashtra v. Ramdas Shrinivas Nayak and another, AIR 1982 SC 1249, the Supreme Court has already laid down :

"The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence."

12. Shri Trivedi, learned counsel appearing for respondent no.1 herein, has himself appeared before the Assistant Registrar and filed certificate of posting before the Assistant Registrar as recorded by the Assistant Registrar. Mr.R.R. Shah himself appeared for the other party. The Assistant Registrar has also perused the certificate and thereafter has specifically stated that there is nothing suspicious about the same, nor has anything been pointed out to him. In that view of the matter, it is rather sad that Shri Shah, learned counsel for the appellant has chosen to contradict it across the Bar even when his clients have not chosen to do so in either the appeal memo or the Civil Application.

13. Now coming to the submissions made by the rival counsel, secs.21(1) and (2) of Trade and Merchandise Marks Act read as under :

"21. Opposition to registration -- (1) Any person may, within three months from the date of the advertisement or re-advertisement of an application for registration or within such further period, not exceeding one month in the aggregate, as the Registrar, on application made to him in the prescribed manner and on payment of the prescribed fee, allows, give notice in writing in the prescribed manner to the Registrar, of opposition to the registration.

(2) The Registrar shall serve a copy of the notice on the applicant for registration and, within two months from the receipt by the applicant of such copy of the notice of opposition, the applicant shall send to the Registrar in the prescribed manner a counter statement of the grounds on which he relies for his application, and if he does not do so he shall be deemed to have abandoned his application.

.. . . ."

14. The submission of Shri Shah, learned counsel is that if the counter statement is not sent to the Registrar within two months from the date of receipt of the notice of opposition, the applicant shall be deemed to have abandoned the application. Thus, a deeming fiction is created against the applicant, who does not choose to send a counter statement within two months from the date of receipt of the application. Hence one has to be very careful about such a provision, which specifically provides that the party will be deemed to have abandoned his application.

14.1 In the instant case admittedly the notice of opposition was received by the applicant on 18.1.1995 and it had time of two months to file counter statement. The last date for that was 17.3.1995. As stated above on that day the applicant could not have sent it either by hand delivery or by post since it was a public holiday. The next day, 18.3.1995 was Saturday when the office of the Registrar was closed.

14.2 Shri Shah, learned counsel states that on that day Post Office was working and hence the applicant could have sent the counter by post on that day. He having not done that and having chosen to send it on 20.3.1995, it cannot be said that is sent within two months.

15. As far as this submission of Shri Shah, learned

counsel is concerned it cannot be accepted for this reason that when two modes of sending documents are available to a party, either of the options are available to the concerned party and in that event two different consequences cannot flow merely because a party has chosen to take one recourse. In the instant case the fact remains that on 20.3.1995 the papers were sent by post.

16. Section 10(1) of the General Clauses Act provides as follows :

"Computation of time :

Where, by any Central Act or Regulation made after the commencement of this Act, any act or proceeding is directed or allowed to be done or taken in any Court or Office on a certain day or within a prescribed period then, if the Court or Office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or Office is open."

17. This section clearly permits a party to do an act with respect to public office on subsequent day which it could have done on the last day provided for doing a particular act. Rule 15 of the Trade and Merchandise Marks Rules, 1959 (hereinafter referred to as "the Rules") provides for service of documents as follows :

"15. Service of documents - (1) All applications, notices, statements, papers having representations affixed thereto, or other documents authorised or required by the Act or the rules to be made, served, left or sent, at or to the Trade Marks Registry or with or to the Registrar or the Central Government, or any other person may be sent through the post by a pre-paid letter.

(2) Any application or any document so sent shall be deemed to have been made, served, left or sent at the time when the letter containing the same would be delivered in the ordinary course of post.

(3) In proving such sending it shall be sufficient to prove that the letter was properly addressed and put into the post."

18. This rule and particularly Rule 15(2) specifically provides that an application shall be deemed to have been sent when letter containing the same should be delivered in the ordinary course and then sub-rule (3) provides that sending it shall be sufficient to prove that the letter was properly addressed and put into the post. That is definitely proved by drawing attention of the Assistant Registrar to the Posting Certificate which shows that on 20.3.1995, it was given to Postal authorities for despatch.

19. Shri Shah, learned advocate refers to section 127 of the Act, which provides in subclause (3) that ;

"Where a fee is payable in respect of the filing of a document at the Trade Marks Registry, the document shall be deemed not to have been filed at the Registry until the fee has been paid."

We have however, seen what is provided in Rule 15(2) of the Rules. Besides Rule 11 (3 & 5) of the Rules about the fee, are also relevant. They read as follows :

"11. Fees -

(1) ...

(2) ...

(3) Fees may be paid in cash or sent by money order addressed to the Registrar of Trade Marks or by postal order or by a bank draft issued by, or by a cheque drawn on and guaranteed by, a scheduled bank as defined in the Reserve Bank of India Act, 1934 (2 of 1934) or at the discretion of the Registrar by a cheque drawn on such bank even though not so guaranteed, and if sent through post shall be deemed to have been paid at the time when the money order or the properly addressed and prepaid letter containing the postal order, or bank draft or cheque would be delivered in the ordinary course of post.

(4) ...

(5) Where a fee is payable in respect of the filing of a document, the date on which the entire fee is paid shall be deemed to be the date of filing of the document."

20. Rule 11(3) clearly states that where, if required fee is sent through post, it shall be deemed to have been paid at the time when the money order or properly addressed prepaid letter containing cheque, etc would be delivered in the ordinary course. In these circumstances it cannot be said that respondent no.1 had not sent counter within the period of two months, which is provided for that.

21. Shri Shah, learned counsel relied upon a Supreme Court decision in the case of Ajit Singh Thakur Singh and another v. State of Gujarat, XXII GLR 268. I am afraid that this does not help the appellant in any way. All that it provides is that if the period of limitation is allowed to expire without appeal being filed in time and if sufficient cause is sought to be explained with respect to something happening thereafter, it can be of no assistance. That judgment itself provides that the parties are entitled to wait until the last date of limitation for filing an appeal.

22. Shri Shah relied upon another decision of the Supreme Court in (H.H. Raja) Harinder Singh v. S. Karnail Singh and others, AIR 1957 SC 271 and particularly para 5 thereof. I fail to understand as to how this decision even helps the appellant. In fact, the proposition therein is quite contrary to what is canvassed by the appellant herein. The observations in para 5 of the said judgment, which are on sec.10 of the General Clauses Act, read as under :

"Where, therefore, a period is prescribed for the performance of an act in a Court or office, and that period expires on a holiday, then according to the section the act should be considered to have been done within that period, if it is done on the next day on which the Court or office is open. For that section to apply, therefore, all that is requisite is that there should be a period prescribed and that period should expire on a holiday."

23. On the facts and in the circumstances, there is no substance in any of these three appeals, nor is there any error in the order passed. Shri Shah, learned counsel submitted that there is no such procedure to issue such notice to consider as to whether the counter statement filed is in time or not. I fail to understand how any fault can be found with the Assistant Registrar on those grounds when sec.21(2), if pressed into service, is to result into deeming fiction against the applicant that he

has abandoned his application. If any such inference is to be drawn against the party, it is all the more desirable that the party must have an opportunity to explain and in the circumstances there was nothing wrong with the Registrar issuing notice on receiving counter statement to decide as to whether it was sent within two months or not.

24. In the circumstances all these three appeals are dismissed. Notices are discharged. No order as to costs.

25. Shri Shah, learned counsel requests that the stay granted earlier be continued for four weeks to approach the Apex Court. Shri Trivedi, learned counsel objects. Still, the stay is ordered to continue for four weeks from today in the interest of justice. All the three Civil Applications also stand disposed of. Notices are discharged. No order as to costs.

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